No. 83-466

# In the Supreme Court of the United States

OCTOBER TERM, 1983

ANTHONY JOSEPH RUSSO, JR., PETITIONER

*v.*

JOHN N. MITCHELL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## TABLE OF AUTHORITIES

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Petitioner asserts that the court of appeals, although establishing correct procedures for district courts to follow in adjudicating claims of state secrets privilege, erred by failing to require the district court to follow those procedures in this case.

1. Petitioner and others brought this action in the United States District Court for the District of Columbia. They sought damages from former government officials who allegedly were responsible for warrantless electronic surveillance of the plaintiffs. In response to certain of the plaintiffs' efforts to discover information about the electronic surveillance, two Attorneys General, the Secretary of Defense, and the Director of Central Intelligence asserted claims of state secrets privilege (see *United States* v. *Reynolds*, 345 U.S. 1 (1953)). These claims of privilege were accompanied in each case by a detailed submission that was

filed with the district court in camera, and in two instances by a brief public affidavit. Pet. App. 3a-10a.

The district court upheld the assertions of privilege and dismissed the plaintiffs' claims insofar as they pertained to surveillance of foreign communications (see Pet. App. 11a). The court explained that "plaintiffs' claims with respect to alleged electronic surveillance of their foreign communications * * * tender[] to the Court issues for litigation which deal necessarily with matters this Court has already determined to be state secrets privileged from disclosure" (*id.* at 28a n.55). Petitioner and other plaintiffs whose claims were dismissed appealed. The court of appeals reversed in part but affirmed the dismissal of petitioner's claim (*id.* at 1a-47a).

The court of appeals reexamined the in camera submissions (see Pet. App. 18a) and sustained all of the state secrets privilege claims except for one that concerned the identity of the Attorneys General who had authorized the surveillances in issue (*id.* at 18a-20a). (Following the court's ruling, the government promptly disclosed this information.) The court of appeals then considered the procedures that district courts should follow in weighing assertions of state secrets privilege by the government. The court of appeals concluded that, in general, "*in camera* proceedings should be preceded by as full as possible a public debate over the basis and scope of a privilege claim" (*id.* at 26a). The court of appeals further stated (*id.* at 26a-27a; footnote omitted):

> [W]e conclude that, in situations in which close examination of the government's assertions is warranted, the trial judge should insist (1) that the formal claim of privilege be made on the public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and

the reason those harms would result from revelation of the requested information or (b) indicate why such an explanation would itself endanger national security. * * * [W]e do not wish to discourage procedural innovation. We hold simply that, before conducting an *in camera* examination of the requested materials, the trial judge should be sure that the government has justified its claim in as much detail as is feasible (and would be helpful) without undermining the privilege itself.[1]

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[1]The court of appeals then discussed at length the effect that a valid assertion of the state secrets privilege should have on a claim that cannot be fully adjudicated without resort to privileged information (Pet. App. 27a-40a). The court upheld the dismissal of the claims of those plaintiffs—including petitioner—whom the government had not specifically admitted overhearing (*id.* at 30a) but reversed the dismissal of the claims of other plaintiffs whom the government specifically acknowledged, on the public record, that it had overheard (*id.* at 31a-37a). The basis of the court of appeals' distinction was apparently that the latter category of plaintiffs might be able to establish a prima facie case of a violation of the Constitution without resort to privileged information (see *id.* at 28a n.55, 30a-31a, 36a). Judge MacKinnon dissented in part, urging that all the claims involved in the appeal should have been dismissed on the ground that the defendants were entitled to qualified immunity (*id.* at 41a-47a).

We have serious doubt about the correctness of the court of appeals' refusal to affirm all of the dismissals. See generally *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981); *United States* v. *Reynolds*, 345 U.S. at 11 & n.26; *Totten* v. *United States*, 92 U.S. 105, 107 (1876); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *id.* at 276-281 (Phillips, J., dissenting from panel opinion). We have not sought further review on this question, however, in part because the judgment is interlocutory and it is unclear whether the court of appeals' lengthy discussion—which is explicitly dictum (see Pet. App. 28a) and appears to conflict with other decisions by the court of appeals (see *Salisbury* v. *United States*, 690 F.2d 966, 975-977 & n.4 (D.C. Cir. 1982); *Halkin* v. *Helms*, 598 F.2d 1, 9-11 & n.7 (D.C. Cir. 1978))—establishes the law of the circuit.

2. Petitioner explicitly agrees with the court of appeals' prescriptions about the procedures district courts should follow in evaluating claims of state secrets privilege (Pet. 16-17, 19). Petitioner also asserts (*id.* at 12) that the court of appeals correctly determined that the district court's handling of the privilege claims in this case was deficient. Petitioner's only contention appears to be that the court of appeals, having made this determination, should have remanded for further proceedings on the validity of the assertions of privilege instead of upholding the dismissal of his claim (*id.* at 13-14, 15).[2]

It is immediately apparent that this question is not sufficiently important to warrant this Court's review. Petitioner challenges only the court of appeals' application of a standard that petitioner accepts—indeed, eagerly endorses—to the particular circumstances of this case.

In addition, there is no reason to believe that the court of appeals erred in applying its own prescriptions. Although the court of appeals did criticize the district court's handling of the privilege claims to some degree (see Pet. App. 25a-26a), it is not clear, contrary to petitioner's suggestion, that the court of appeals concluded that the district court departed substantially from the approach that the court of appeals considered correct (see *id.* at 26a).

Moreover, even if there were substantial departures, it was entirely appropriate for the court of appeals to conclude that they were harmless error. As petitioner and the court of appeals agree (see Pet. 16-18; Pet. App. 25a), the purpose of the procedures prescribed by the court of appeals is to permit the validity of privilege claims to be

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[2]Petitioner does not challenge the court of appeals' decision insofar as it rests on the proposition that if the assertions of privilege *are* valid, his claims should be dismissed.

thoroughly tested. But the court of appeals, upon examining the in camera materials relevant to the privilege claims, concluded that those claims were valid. If the court of appeals believed—as it evidently did—that further testing according to the procedures it prescribed would not draw the validity of the privilege claims into question, it would have been pointless and wasteful to order a remand. Accordingly, the court of appeals correctly declined to order further proceedings on petitioner's claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

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